Fipper Marketing Sdn Bhd v Sun High-Tech Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO WA-22NCVC-954–12 OF 2019
MOHD NAZLAN J
10 MARCH 2022

Contract — Sale and purchase agreement — Specific performance — Plaintiff claimed for specific performance of sale and purchase agreement — Defendant counterclaimed sale and purchase agreement had been lawfully terminated — Whether sale and purchase agreement conditional on consent from authority — Whether fire on properties constituted temporary frustration — Whether there was delay by plaintiff in payment of balance purchase price — Whether termination by defendant was valid

This was a writ action by the plaintiff against the defendant, essentially asking for a specific performance of an agreement between the parties for a purchase of property which the latter counterclaimed to have been lawfully terminated. The plaintiff and the defendant executed a sale and purchase agreement ('the SPA') on the purchase by the former from the latter of two units of 1 1/2 storey link factory ('the properties'). Upon execution of the SPA, the plaintiff had duly paid the defendant the 10% deposit. Fire however unexpectedly broke out, destroying a major part of the properties. The defendant sought the SPA to be suspended pending restoration and rectification works, which took almost seven months, with the defendant later producing a work done report. Whilst the properties were said to have been completely restored, it was contended by the plaintiff that no time limit was agreed or fixed by parties for the completion of the SPA. The plaintiff emphasised that neither did the defendant mention to the plaintiff any deadline for payment. This therefore meant that following from the fire, the time for the completion of SPA was thrown at large, with no deadline. But the defendant did seek from the plaintiff a written undertaking to complete the transaction (following the restoration of the properties after the fire). The plaintiff acceded to, and signed the undertaking, stating its intention to proceed and complete the SPA transaction. However, according to the plaintiff, the defendant somehow abruptly issued a termination notice based on the delay by the plaintiff, for some 14 months from SPA execution to pay the balance purchase price. Hence, this action by the plaintiff contending that the termination notice was premature, invalid, bad in law and had contravened the terms and conditions of the SPA. In response, the defendant counterclaimed for a declaration that first, the SPA had been legally terminated by the defendant and secondly, that the 10% deposit had thus been lawfully forfeited by the defendant.

Held, dismissing the plaintiff's claim and allowing the defendant's counterclaim:

(1) The completion period based on the SPA was four months. This was a period during which the balance purchase price should be paid by the plaintiff, but it started to run only upon receipt by the purchaser of the consent to transfer from the authority. However, post SPA-execution, the parties agreed that no consent whatsoever was required for the transfer of the properties. According to section 6 of the First Schedule to the SPA, the properties were stated to be freehold property without any restriction in interest meaning that consent to transfer from the relevant authorities was plainly irrelevant and thus not required. The date of the SPA would be the 'unconditional date' because the SPA was unconditional from its execution in the absence of the necessity to obtain the consent to transfer. The plaintiff was required to pay the balance purchase price within three months (plus one month) from the date of SPA which was the unconditional date. Not only that, the plaintiff in response to the defendant had issued a letter undertaking to complete the SPA without any supplementary agreement. It could not now be said by the plaintiff that such acceptance by the defendant constituted a waiver and caused the time to make payment to remain large. The parties had thus by conduct agreed not to be subject to the condition to transfer and not to require a supplementary agreement to rectify the same (see paras 23–24, 29, 31–32, 34 & 38).

(2) The plaintiff's assertion that the payment of the balance purchase price was suspended or temporarily frustrated due to the occurrence of the fire could not be right because such a concept — temporary frustration of contract — was not part of the law in common law jurisdictions. There was also no provisions existed in the SPA to allow a temporary frustration of the SPA. The doctrine of temporary frustration was as such not applicable. A contract was either frustrated or remained in force. Frustration did not suspend the contract it terminated such that it did not subsequently revive. Accordingly, the fire incident could not temporarily suspend the contract and time continued to run (see paras 43, 45 & 52).

(3) The parties had been in communication in relation to the deadline to pay the balance purchase price. It was misconceived for the plaintiff to contend that parties did not set a completion date after the fire accident. The deadline of 13 October 2019 was a contractual deadline calculated based on the SPA and in reference to contemporaneous documents. There was no valid basis to contend that the defendant was approbating and reprobating or that the undertaking letter (which also did not request for any extension of time for the payment of the balance purchase price) constituted some form of a waiver, causing time to remain at large. The

plaintiff had clearly failed to ever honour its contractual duty to make payment of the balance purchase price under the SPA based on the various revised deadlines formulated in accordance with the conduct of the parties (see paras 76–77, 81 & 83).

(4) The case of the defendant on the counterclaim that the termination of the SPA was lawful and the deposit paid by the plaintiff for the SPA may be validly forfeited by the defendant was well-supported and should be allowed. As a result of the failure on the part of the plaintiff to fulfil its contractual obligation, cl 15 of the SPA would kick in, permitting the defendant to exercise its rights to terminate the SPA and forfeit all the deposit paid under the SPA. There is no merit to the argument that the termination notice is defective in the absence of sufficient notice for the plaintiff to pay the balance purchase price because the SPA treats time to be of the essence. There was in addition no requirement in cl 15 of the SPA or anywhere else in the SPA for time be granted to the plaintiff to remedy before the termination became effective. Since there was no further extension of time and the plaintiff had undoubtedly failed to pay the balance purchase price within the various agreed time periods, the termination of the SPA by the defendant was therefore valid (see paras 84–87 & 92).

[Bahasa Malaysia summary

Ini adalah tindakan writ oleh plaintif terhadap defendan, pada asasnya memohon pelaksanaan spesifik perjanjian antara pihak-pihak untuk pembelian harta yang kemudiannya dituntut balas telah ditamatkan secara sah. Plaintif dan defendan telah melaksanakan perjanjian jual beli ('SPA') ke atas pembelian oleh plaintif daripada defendan dua unit 1 1/2 tingkat kilang teres ('harta tanah'). Selepas pelaksanaan SPA, plaintif telah membayar deposit 10% kepada defendan. Kebakaran bagaimanapun berlaku secara tidak dijangka, memusnahkan sebahagian besar harta tanah. Defendan memohon SPA digantung sementara menunggu kerja-kerja pemulihan dan pembetulan, yang mengambil masa hampir tujuh bulan, dengan defendan kemudiannya menghasilkan laporan kerja yang telah dilakukan. Walaupun harta tanah tersebut dikatakan telah dipulihkan sepenuhnya, ia telah dipertikaikan oleh plaintif bahawa tiada had masa telah dipersetujui atau ditetapkan oleh pihak-pihak untuk menyempurnakan SPA. Plaintif menegaskan bahawa defendan juga tidak menyebut kepada plaintif sebarang tarikh akhir pembayaran. Oleh itu, ini bermakna bahawa berikutan daripada kebakaran itu, masa untuk menyempurnakan SPA telah dibuang, tanpa tarikh akhir. Tetapi defendan telah meminta daripada plaintif akujanji bertulis untuk menyelesaikan transaksi itu (berikut pemulihan harta tanah selepas kebakaran). Plaintif bersetuju dengan, dan menandatangani akujanji itu, menyatakan hasratnya untuk meneruskan dan menyempurnakan transaksi SPA. Walau bagaimanapun, menurut plaintif, defendan secara tiba-tiba

mengeluarkan notis penamatan berdasarkan kelewatan plaintif, selama kira-kira 14 bulan dari pelaksanaan SPA untuk membayar baki harga belian. Oleh itu, tindakan plaintif ini mendakwa bahawa notis penamatan itu adalah pramatang, tidak sah, salah di sisi undang-undang dan telah melanggar terma dan syarat SPA. Sebagai balasan, defendan menuntut balas untuk pengisytiharan bahawa pertama, SPA telah ditamatkan secara sah oleh defendan dan kedua, bahawa deposit 10% itu telah dilucuthakkan secara sah oleh defendan.

Diputuskan, menolak tuntutan plaintif dan membenarkan tuntutan balas defendan:

(1) Tempoh penyempurnaan berdasarkan SPA adalah empat bulan. Ini adalah tempoh di mana baki harga belian perlu dibayar oleh plaintif, tetapi ia mula berjalan hanya selepas penerimaan oleh pembeli persetujuan untuk memindahkan daripada pihak berkuasa. Walau bagaimanapun, selepas pelaksanaan SPA, pihak-pihak bersetuju bahawa tiada sebarang persetujuan diperlukan untuk pemindahan harta tanah tersebut. Menurut seksyen 6 Jadual Pertama SPA, harta tanah tersebut telah dinyatakan sebagai harta pegangan bebas tanpa sebarang sekatan kepentingan yang bermaksud bahawa kebenaran pemindahan daripada pihak berkuasa yang berkaitan adalah jelas tidak relevan dan oleh itu tidak diperlukan. Tarikh SPA akan menjadi 'tarikh tanpa syarat' kerana SPA tidak bersyarat daripada pelaksanaannya dengan ketiadaan keperluan untuk mendapatkan persetujuan untuk pemindahan. Plaintif dikehendaki membayar baki harga belian dalam tempoh tiga bulan (tambah satu bulan) dari tarikh SPA yang merupakan tarikh tanpa syarat. Bukan itu sahaja, plaintif sebagai jawapan kepada defendan telah mengeluarkan surat akujanji untuk menyempurnakan SPA tanpa sebarang perjanjian tambahan. Kini tidak boleh dikatakan oleh plaintif bahawa penerimaan sedemikian oleh defendan merupakan penepian dan menyebabkan masa untuk membuat pembayaran kekal bebas. Oleh itu, pihak-pihak melalui kelakuan telah bersetuju untuk tidak tertakluk kepada syarat pemindahan dan tidak memerlukan perjanjian tambahan untuk membetulkan perkara yang sama (lihat perenggan 23–24, 29, 31–32, 34 & 38).

(2) Penegasan plaintif bahawa pembayaran baki harga belian telah digantung atau dikecewakan buat sementara waktu kerana berlakunya kebakaran adalah tidak betul kerana konsep sedemikian — kekecewaan sementara kontrak — bukan sebahagian daripada undang-undang dalam bidang kuasa common law. Juga tiada peruntukan wujud dalam SPA untuk membenarkan kekecewaan sementara SPA. Doktrin kekecewaan sementara tidak boleh digunakan. Kontrak sama ada kecewa atau kekal berkuat kuasa. Kekecewaan tidak menggantung kontrak ia menamatkan supaya ia tidak dihidupkan semula. Sehubungan itu, kejadian kebakaran

tidak dapat menangguhkan sementara kontrak dan masa terus berjalan (lihat perenggan 43, 45 & 52).

(3) Pihak-pihak telah berkomunikasi berhubung dengan tarikh akhir untuk membayar baki harga belian. Adalah disalah anggap untuk plaintif berhujah bahawa pihak tidak menetapkan tarikh penyempurnaan selepas kejadian kebakaran. Tarikh akhir 13 Oktober 2019 adalah tarikh akhir kontrak yang dikira berdasarkan SPA dan merujuk kepada dokumen. Tidak ada asas yang sah untuk menegaskan bahawa defendan telah bersetuju dan menolak atau bahawa surat akujanji (yang juga tidak meminta sebarang lanjutan masa untuk pembayaran baki harga belian) membentuk penepian, menyebabkan masa kekal pada umumnya. Plaintif jelas gagal untuk menunaikan kewajipan kontraknya untuk membuat pembayaran baki harga belian di bawah SPA berdasarkan pelbagai tarikh akhir yang disemak semula yang dirumuskan mengikut kelakuan pihak-pihak (lihat perenggan 76–77, 81 & 83).

(4) Kes defendan atas tuntutan balas bahawa penamatan SPA adalah sah dan deposit yang dibayar oleh plaintif untuk SPA boleh dilucuthakkan secara sah oleh defendan telah disokong dengan baik dan harus dibenarkan. Akibat kegagalan pihak plaintif untuk memenuhi kewajipan kontraknya, klausa 15 SPA akan bermula, membenarkan defendan melaksanakan haknya untuk menamatkan SPA dan melucuthakkan semua deposit yang dibayar di bawah SPA. Tiada merit kepada hujahan bahawa notis penamatan itu rosak kerana ketiadaan notis yang mencukupi untuk plaintif membayar harga belian baki kerana SPA menganggap masa sebagai inti pati. Di samping itu, tiada keperluan dalam klausa 15 SPA atau mana-mana lain dalam SPA untuk diberikan masa kepada plaintif untuk remedi sebelum penamatan itu berkuat kuasa. Oleh kerana tiada lanjutan masa lagi dan plaintif sudah pasti gagal membayar harga belian baki dalam pelbagai tempoh masa yang dipersetujui, penamatan SPA oleh defendan adalah sah (lihat perenggan 84–87 & 92).]

Cases referred to

Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd [2016] MLJU 1878; [2016] 10 CLJ 247, HC (refd)

Bank of New York Mellon (International) Ltd v Cine-UK Ltd and other cases [2021] EWHC 1013 (QB), QBD (refd)

Glynn and others v Margetson & Co and others [1893] AC 351, HL (refd)

Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 WLR 896, HL (refd)

Leong Ah Kew v Prisma Suria Sdn Bhd [2015] MLJU 713; [2015] 8 CLJ 300, HC (folld)

Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors [2005] 2 MLJ 32, CA (refd)
Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd [2009] 2 MLJ 546; [2009] 2 AMR 50, CA (folld)
Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Contracts Act 1950 s 56

Lee Chai Meng (with Ho Wen Hui) (CM Lai & Partners) for the plaintiff.
Lum Kok Kiong (with Tan Ming Chu) (Lum Kok Kiong & Co) for the defendant.

Mohd Nazlan J:

INTRODUCTION

[1] This is a writ action by the plaintiff company against the defendant company, essentially asking for a specific performance of an agreement between the parties for a purchase of property which the latter counterclaimed to have been lawfully terminated.

[2] At the conclusion of trial which was conducted entirely by way of a remote communication technology via Zoom, I found that the plaintiff has not proven its case for specific performance, whilst the defendant has shown that termination of the agreement was lawfully made. The claim is therefore dismissed, and the counterclaim is allowed. This judgment contains the full reasons for the verdict.

KEY BACKGROUND FACTS

[3] The plaintiff and the defendant on 6 September 2018 executed a sale and purchase agreement ('the SPA') on the purchase by the former from the latter of two units of 1 1/2 storey link factory situated on Geran 228960, Lot 34574 dan Geran 228961, Lot 34575, both at Pekan Serdang, in Daerah Petaling, Selangor ('the said properties') for an aggregate total purchase price of RM1.95m.

[4] Among the main terms and conditions of the SPA are first, pursuant to Recital (3), the said properties are subject to legal charge created by defendant in favour of RHB Bank; secondly, cl 3.1 and 3.2 provide that 10% deposit (RM195,000) shall be paid upon signing of the SPA; thirdly, cl 3.3 states that the balance purchase price amounting to RM1,755,000 shall be paid within the period of three months commencing from the date of receipt by the purchaser's solicitors of a copy of the consent to transfer from the relevant authority; and fourthly under cl 3.4, despite any failure to pay the said balance

purchase price within the prescribed three month period, an extension of one month will be granted automatically, subject to interest at a rate of eight per centum per annum calculated on a day-to-day basis.

[5] Upon execution of the SPA, the plaintiff had duly paid the defendant the 10% deposit. Prior to the execution of the SPA on 6 September 2018, the plaintiff had its loan facility for 90% of the purchase price approved by CIMB Islamic Bank on 3 September 2018.

[6] The plaintiff's version is that following the defendant's instructions, the defendant's solicitors requested for the redemption statement from RHB Bank vide a letter dated 5 November 2018. However, the said redemption statement was only later issued on 20 February 2019, despite the fourteen days' timeframe stated under cl 7.1 of the SPA.

[7] Fire however, unexpectedly broke out on 8 January 2019, destroying a major part of the said properties. The defendant sought the SPA to be suspended pending restoration and rectification works, which took almost seven months, with the defendant later producing a work done report dated 5 July 2019.

[8] The problem is that whilst the said properties were said to have been completely restored, it is contended by the plaintiff that no time limit was agreed or fixed by parties for the completion of the SPA. The plaintiff emphasised that neither did the defendant mention to the plaintiff any deadline for payment. This therefore meant that following from the fire, the time for the completion of SPA was thrown at large, with no deadline.

[9] But the defendant did in the period of between 7 October 2019 and 18 October 2019, seek from the plaintiff a written undertaking to complete the transaction (following the restoration of the said properties after the fire).

[10] This, the plaintiff acceded to, and signed the undertaking dated 24 October 2019, stating its intention to proceed and complete the SPA transaction.

[11] However, according to the plaintiff, the defendant somehow abruptly issued a termination notice dated 25 November 2019, on the basis of the delay by the plaintiff, for some 14 months from SPA execution to pay the balance purchase price.

[12] The plaintiff felt aggrieved. It asked, in submissions, what exactly is the last date for the payment of balance purchase price before one could say there

was a delay. The plaintiff said there was no such date, from fire outbreak and thereafter, until the said notice of termination.

[13] The plaintiff then filed the writ of summons and the statement of claim which sought for the specific performance of the SPA, contending that the termination notice is premature, invalid, bad in law and has contravened the terms and conditions of the SPA.

[14] In response, the defendant counterclaimed for a declaration that first, the SPA has been legally terminated by the defendant and secondly, that the 10% deposit has thus been lawfully forfeited by the defendant.

THE TRIAL

[15] At the full trial of this action, the plaintiff called two witnesses, as did the defendant. The plaintiff's witnesses were Goh Swee Sim (a shareholder in and the business development officer of the plaintiff company) and Ang Yu Hui (an advocate and solicitor), whilst the witnesses for the defendant were Yong See Wai (the defendant company's accounts manager) and Koi Chor Koon (a director of the defendant).

ISSUES TO BE TRIED

[16] Flowing from the pleadings of parties, and although the parties had filed separate issues to be tried it cannot be seriously doubted that the key issues in this trial are not complex, and are as follows.

(a) whether the SPA is a conditional agreement which is subject to the consent to transfer by the relevant authority;

(b) whether there is a delay by the plaintiff to pay the balance of the purchase price to the defendant;

(c) whether the fire that occurred on the said properties was an intervening event and constituted a temporary frustration that suspended the SPA;

(d) whether the plaintiff is entitled to claim specific performance of the SPA;

(e) whether there is any breach of the SPA by the plaintiff;

(f) whether the termination of the SPA by the defendant is valid; and

(g) whether the defendant is entitled to claim the reliefs as prayed for.

[17] These issues will be examined below, albeit not necessarily in the order they appear, and may be analysed together where appropriate.

ESSENCE OF CONTENTIONS OF LITIGANTS

[18] The crux of the plaintiff's claim against the defendant, as intimated above, was for specific performance by reason of the alleged invalid or unlawful termination of the SPA by the defendant. Essentially, it was asserted that pursuant to cl 3.3 of the SPA, the balance purchase price shall only be made three months from the date of receipt of the consent to transfer by the relevant authorities by the defendant and not from the date of the SPA.

[19] The plaintiff contended further that payment of the said balance purchase price was also temporarily frustrated due to the occurrence of the fire.

[20] It was thus the position of the plaintiff that the SPA should now be enforced because the delay in payment is attributable to the defendant; time was no longer of essence and was in fact at large; the termination of the SPA is unlawful and that in any event the plaintiff has always been ready, willing and able to complete the SPA.

[21] On the other hand, the case of the defendant is that the termination of the SPA was by reason of the fact that the plaintiff had failed to pay the balance purchase price within the stipulated and agreed deadlines. As such, the termination of the SPA is lawful and valid.

EVALUATION AND FINDINGS OF THIS COURT

Whether the SPA is conditional on the consent from authority

[22] This is an issue that should be addressed first. Pursuant to cll 3.3 and 3.4 of the SPA, the balance purchase price shall be paid within the period of four months (three months plus one month extension with interest) from the date of obtaining the state authority's consent to transfer the said properties. For completeness these clauses read as follows:

> 3.3 Subject to Clause 3.4 below, the Purchaser shall pay the balance purchase price set out in Section 3 of the Second Schedule hereto ('hereinafter referred to as 'the Balance Purchase Price') to the Vendor's Solicitors to hold as stakeholders and deal with it in accordance with Clause 9 of this Agreement within the period of three (3) months commencing from the date of receipt by the Purchaser's Solicitors of a copy of the Consent to transfer from the Relevant Authority (hereinafter referred to as 'the Completion Period') ...
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> 3.4 In the event that the Balance Purchase Price is not paid in full to the Vendor's Solicitors on or before the expiry of the Completion Period, the Vendor shall automatically grant to the Purchaser the period of one (1) month commencing the day following the expiry of the Completion Period or such other period as may be mutually extended in writing by the parties (hereinafter referred to as 'the Extended Completion Period') ...

[23] Thus, the completion period, for all intents and purposes, based on the aforesaid clauses, is four months. This is a period during which the balance purchase price should be paid by the plaintiff, but it starts to run only upon receipt by the purchaser of the consent to transfer from the authority. This is what stated in the SPA. Or at least, that very clause of the SPA.

[24] However, despite that, post SPA execution, it is fair to say, parties are in agreement that in fact and under the law, no consent whatsoever was required for the transfer of the said properties.

[25] This, as highlighted by the plaintiff, would mean that if the term remains as it is, the time for completion will not or never run, since obtaining the said consent would be wholly unachievable. And because of this, the plaintiff argued, in a narrative that is objected to by the defendant, that the SPA ought to have been rectified through a supplementary agreement. The plaintiff further developed the contention that until and unless there is a supplemental agreement entered into by the parties to rectify the inaccuracy and to decide on the completion date, time remained at large. There is no such rectification to date.

[26] I now make a couple of observations. First, the above provisions in clause are contained in a contractual document — the SPA. In *Leong Ah Kew v Prisma Suria Sdn Bhd* [2015] MLJU 713; [2015] 8 CLJ 300, the High Court had stated thus:

> [8] Common law has established a number of important principles in the interpretation of contracts, one of which, especially relevant for present purposes is that the construction of contract is a question of law for determination by the court and not by witnesses through their evidence. In *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 WLR 1514, Lord Diplock stated the following:
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> > In a case which turns, as this one does, on the construction to be given to a written document, a court called on to construe the document in the absence of any claim to rectification, cannot be bound by any concession made by any of the parties as to what its language means. That is so even in the court before which the concession is made; *a fortiori* in the court to which an appeal from the judgment of the court is brought. The reason is that the construction of a written document is a question of law. It is for the judge to decide for himself what the law is, not to accept it from any or even all the parties to the suit; having so decided it is his duty to apply it to the facts of the case. He would be acting contrary to his judicial oath if he were to determine the case by applying what the parties conceived to be the law, if in his own opinion it were erroneous.
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> [9] This has since been emphatically followed in Malaysian cases, such as in the Court of Appeal decision in *NVJ Menon v The Great Eastern Life Assurance Company Ltd* [2004] 3 MLJ 38; [2004] 3 CLJ 96.

[27] Secondly, and no less significantly, in this case, the construction is to be based on the plain and ordinary meaning of the provisions of the contracts, having regard to the entirety of the contractual context, barring genuine ambiguities. In the Court of Appeal decision in *Syarikat Binaan Utara Jaya (a firm) v Koperasi Serbaguna Sungai Glugor Bhd* [2009] 2 MLJ 546; [2009] 2 AMR 50, Abdul Malik Ishak JCA stated the following key principles:

> [15] Of course, it is trite that when interpreting a contract the language of the contract must be taken into consideration. The intention of the parties is to be primarily gathered from the language employed in the contract itself. If, and only if the language is vague, the surrounding circumstances may be looked into in order to assist in interpreting the contract (*Bipin Behari Deb v Masrab Ali and Others* [1961] AIR Vol 48, 173 Assam).
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> [16] I am fortunate that the contract here is in writing and so the parties are confined within the four corners of the document in which they have chosen to seal their agreement and neither of them can adduce evidence to say that his intention has been misstated or overlooked in the agreement or that some essential features of the contract has been omitted or ignored. To allow such evidence would involve the plain violation of s 92 of the Evidence Act 1950 (*Afshar MM Tacki v Dharamsey Tricamdas* [1947] AIR (34) 98 Bombay).

[28] Guided by these authorities, one must not confine one's focus on cl 3 as the only relevant provision on the subject. After all, the whole of a contract should be examined before construing an individual part of it (per Lord Halsbury in *Glynn and others v Margetson & Co and others* [1893] AC 351 at p 357). This is also not inconsistent with the whole agreement provision in cl 20 of the SPA.

[29] This is because according to section 6 of First Schedule to the SPA itself, the said properties are stated to be freehold property without any restriction in interest. This must readily mean that consent to transfer from the relevant authorities is plainly irrelevant and thus not required.

[30] Furthermore there is absolutely no evidence that either of the contracting party had insisted that the said consent must still be applied for. It is manifest that the requirement is a drafting error.

[31] Instead, evidence shows that the conduct of the parties have given a particular meaning of how they applied section 3, which is that reading cl 3.3 together with the said section 6 of First Schedule to the SPA, the date of the SPA would be the 'unconditional date' as defined by cl 3.3 of the SPA because the SPA is unconditional from its execution in the absence of the necessity to obtain the consent to transfer.

A **[32]** This means that the plaintiff is required to pay the balance purchase price within three months (plus one month) from the date of SPA which is the said unconditional date. This is also confirmed by the testimony of PW2, the plaintiff's solicitors.

B **[33]** Furthermore the plaintiff had also prior to and subsequent to the termination of the SPA imposed a number of deadlines to pay the balance purchase price which were not based any requirement for the consent to transfer but instead that the unconditional date. But which on all occasions the plaintiff failed to honour.

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[34] Not only that. On 7 October 2019, the defendant had asked the plaintiff to confirm that the latter was agreeable to complete the SPA without any supplementary agreement. The plaintiff in response issued a letter dated D 24 October 2019 undertaking to complete the SPA. There was in fact no request for any supplementary agreement. The plaintiff's case that a supplementary agreement was required to rectify the SPA is even contrary to its own document. The defendant accepted the plaintiff's letter of undertaking of 24 October 2019 which confirmed that no supplementary agreement was E necessary. It could not now be said by the plaintiff that such acceptance by the defendant constituted a waiver and caused the time to make payment to remain large.

[35] In fact even after the termination of the SPA, the plaintiff again F attempted to fix another deadline to pay the balance purchase price by 1 February 2020, also without asking for fulfilment of the condition on the consent to transfer. The plaintiff suggested a computation of a proposed new timeline for payment as per the letter dated 28 November 2019 from Messrs G Andrew Jye & Co, but with no request for rectification. As such, its case that a supplementary agreement was necessary to rectify the SPA rings hollow.

[36] I should stress that these contractual provisions should as such be interpreted to give commercial sense to the SPA. In *Investors' Compensation* H *Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society* [1998] 1 WLR 896, Lord Hoffmann explained as follows:

I > The result has been, subject to one important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of 'legal' interpretation has been discarded. The principles may be summarised as follows:
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> ...

(5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191, 201:

> If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to conclusion that flouts business common sense, it must be made to yield to business common sense.

[37] More so here, as it is entirely consistent with the conduct and intention of the parties. The Court of Appeal in *Pinsia Development Sdn Bhd & Ors v Hj Abdul Hadi bin Ahmad & Ors* [2005] 2 MLJ 32, in the judgment of Gopal Sri Ram JCA (as he then was) held thus:

> [4] We therefore have here a situation whereby the parties have by their contemporaneous conduct subsequent to the making of the option agreement have placed an interpretation on cl 2 of exh P2 to the effect that payment of the balance of the 10% was not to be made within the 45 days prescribed by that clause. Is it then open to a court to place a different interpretation on cl 2? With respect, we think not.
>
> [5] We accept that it is settled law that an agreement may not be interpreted by reference to the subsequent conduct of the parties thereto (see *Wickman Machine Tools Sales v L Schuler AG* [1974] AC 235). But it is equally well settled that parties may by their subsequent conduct give a term in an agreement a particular meaning. See *American Surety Co of New York v Calgary Mining Co Ltd* (1919) 48 DLR 295, a decision of the Privy Council. In such an event it is that meaning which binds the court and the court is not then entitled to discover some other meaning in the exercise of its interpretive jurisdiction. See *Amalgamated Investment & Property Co Ltd (in liquidation) v Texas Commerce Bank* [1982] 1 QB 84; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[38] Parties had thus by conduct agreed not to be subject to the condition to transfer and not to require a supplementary agreement to rectify the same (which was unnecessary in any event).

Whether the fire on the said properties constitutes a temporary frustration

[39] There is another reason relied on by the plaintiff to argue that time was not of the essence. This is due to an unexpected intervening event in the form of the fire which destroyed parts of the said properties on 8 January 2019. This resulted in extensive damage to the properties which necessitated restoration and rectification works.

[40] The plaintiff argued that as the natural consequence, the SPA transaction was suspended and that parties also did not set a completion date after the fire incident. Reference was made to the case of *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 where Raja Azlan Shah J (as HRH then was) held as follows:

> The question to be considered is, was time originally of the essence of the contract? There can be no doubt that it was. I do not know how it could have been more strongly expressed than this: 'Clause 17. Time wherever mentioned in this agreement shall be of the essence of the contract'. But that had been waived by the conduct of the defendants. The correspondence and dealings between the parties down to and including 15 November 1967 confirm this view. Time then was no longer of the essence of the contract.

[41] The plaintiff's case is that the SPA was temporarily frustrated, particularly on the obligation to pay the balance purchase price. It claimed that both parties understood the impact of the fire and the time needed for the properties to be restored to the condition as at the time of signing of SPA.

[42] On this point I would agree with the defendant. First, I must emphasise that time is of the essence under the SPA. Clause 25 of the SPA plainly provides thus:

> 25. Time is of the essence
>
> Time wherever mentioned herein shall be of the essence of this Agreement.

[43] Secondly, the plaintiff's assertion that the payment of the balance purchase price is suspended or temporarily frustrated due to the occurrence of the fire cannot be right because such a concept — temporary frustration of contract — is not part of the law in common law jurisdictions, including ours.

[44] This has very recently been made clear by the High Court (England & Wales) in the case of *Bank of New York Mellon (International) Ltd v Cine-UK Ltd and other cases* [2021] EWHC 1013 (QB), as follows:

> 211. However, I do have to deal with SportsDirect's arguments that there has been a 'temporary frustration'. It seems to me that, arising from the matters above, there are two combined reasons why the Tenants have no real prospects of establishing such to have been or be the case, being:
>
> (a) *First, that there is no such thing as a 'temporary frustration', effectively suspending the contract for a period of time, in law. Both Treitel and the case-law, in particular my initial citations from Panalpina, make clear that frustration has the effect of discharging the contract and ending it.* That is one reason why such a 'radical difference' has to exist. *Frustration does not suspend the contract, rather it terminates it and so that it does not subsequently revive.* What the Tenants are seeking to do is to introduce one possible

version of the flexibility that Lord Simon said would require statute. *There is no case-law as to general 'temporary frustration'* (I consider the question of 'supervening event' separately below);

(b) Second, in order to have a 'temporary frustration' there could not be a 'full frustration'. However, the doctrine of frustration is dependent on a 'radical difference' having occurred which renders it unjust for the contract to continue. It is difficult to see how, where, as here (see above), such a sufficient 'radical difference' does not exist, there can be any frustration at all. If there could be such a temporary frustration then Panalpina would have been a classic case of it and would have been decided differently. The same applies in these cases.

212. I therefore reject the 'temporary frustration' (and any full frustration) argument, and hold it (and they) have no real prospects of success. (Emphasis added.)

[45] Neither can it be shown that any provisions existed in the SPA to allow a temporary frustration of the SPA. There is none.

[46] The plaintiff also argued that there is no certificate of confirmation from the relevant authorities to state that the reparation works on the said properties had put them back to their original position. This in my view is no less misconceived as there is similarly no requirement, contractually or otherwise under these circumstances, for the same.

[47] In any event, cl 27.1 of the SPA only compels the defendant, like in this situation of a destruction or substantial damage to the said properties before the passing of risk to the plaintiff, to repair the said properties at its own costs and expenses. It reads as follows:

27. Passing of Risk and Interest

27.1 The Vendor expressly agrees and confirms that any risks in respect of the Property shall pass to the Purchaser only as from the Delivery Date. In the event of any destruction or substantial damage to the Property before the passing of risks, the Purchaser shall be entitled at his option to either require the Vendor to repair the damage at the Vendor own costs and expenses or to terminate this Agreement whereupon the Vendor shall refund to the Purchaser free from any interest at monies paid by the Purchaser pursuant to this Agreement.

[48] In any event the reparation works had been completed as certified by the consultant, one Ir Foong Tong Weng in which he had concluded that all reparation works on the said properties had been completed to the engineer's satisfaction and that a certificate of work done had also been issued by him.

[49] In addition, it cannot be emphasised enough that notwithstanding the

plaintiff's argument on temporary frustration, because of the fire (on 8 January 2019) until the receipt of the certificate of work done (on 9 July 2019), the plaintiff still failed to pay the balance purchase price within the stipulated deadline, by 13 October 2019 and also failed to pay by two other dates fixed by the plaintiff. And the defendant waited until the lapsing of the second redemption statement which expired on 23 November 2019 before it terminated of the SPA on 25 November 2019.

[50] Next, the plaintiff submitted that it was unable to secure the loan for the purchase since no certificate of completion and compliance ('CCC') was furnished by the defendant. But, again, fundamentally, the performance of the SPA is not subject to the approval of the plaintiff's loan. No such provision existed in the SPA. And PW2, the plaintiff's own solicitors too in his testimony confirmed to such effect, as follows:

> LKK: Andrew, is this SPA subject to approval of loan?
>
> ANG: No.
>
> LKK: It is the sole obligation of the purchaser to make sure that their loan can be disbursed on time, right?
>
> ANG: Yes.

[51] In any event, evidence shows that RHB Bank had even issued an amended letter of offer dated 13 November 2019 to extend the availability period for disbursement of facility because the first letter of offer dated 3 September 2018 had lapsed on or around 2 March 2019 (about six months from the execution date of 6 September 2018) and not due to any purported requirement of the CCC for the said properties as alleged. The plaintiff however chose not to proceed to extend the availability of the loan, as confirmed by both of its witnesses.

[52] The doctrine of temporary frustration is as such not applicable. A contract is either frustrated or remains in force. Frustration does not suspend the contract it terminates such that it does not subsequently revive. Accordingly, the fire incident could not temporarily suspend the contract and time continued to run.

When is the deadline for payment of balance purchase price — was there a delay by plaintiff?

[53] I have found that the SPA is unconditional. This means that the payment obligation starts from the date of its execution (on 6 September 2018) and the plaintiff had three months (plus one month) to honour this promise. However, the fire did damage a substantial part of the said properties. But the

fire occurred on 8 January 2019, a date which has passed the three plus four month payment formula as per the SPA. On this aspect alone it can be seen that the plaintiff failed to make payment.

[54] Nevertheless the court is mindful that there were other factors at play, as envisaged in the SPA itself. This is that it was contemplated that the said properties which were held under a legal charge in favour of RHB Bank were to be discharged to enable a redemption by the defendant be undertaken by the purchaser disbursing the loan it obtained to RHB Bank for that purpose.

[55] The relevant parts of cll 7.1 and 7.4 of the SPA read as follows:

> 7.1 The Vendor's Solicitors shall procure or cause to procure the Redemption Statement cum Undertaking from the Chargee in favour of the Purchaser or the Purchaser's Financier, as the case may be, and cause the same to be forwarded to the Purchaser's Financier's Solicitors within fourteen (14) days from the date of receipt of a letter by the Purchaser's Solicitors or the Purchaser's Financier's Solicitors, as the case may be, requesting for the Redemption Statement cum Undertaking ...
>
> ...
>
> 7.4 The Vendor shall procure or cause to procure the Redeemed Documents from the Chargee and cause the same to be forwarded to the Purchaser's Solicitors or Purchaser's Financier's Solicitors, as the case may be, within fourteen (14) days from the date of receipt of the redemption sum by the Chargee ...

[56] Based on the above said cl 7, the plaintiff contended that it is incumbent on the defendant to deal with the discharge of the said properties, including to procure the requisite redemption statement from RHB Bank, either by itself or through the appointment of the vendor's solicitors. In this case, the defendant, according to the plaintiff, had appointed an advocate and solicitor, Andrew Ang Yu Hui (PW2) from Messrs Andrew Jye & Co to undertake the same. This appears to be supported by the defendant's own witness, Yong See Wai (DW1) in her testimony in that PW2 was appointed by the defendant to procure the redemption statement from RHB Bank. This is also consistent with the evidence of DW2 that the appointment of PW2 by the defendant was to handle the redemption and discharge.

[57] In other words, as to PW2's capacity in this transaction, he is the plaintiff's solicitor limited to the purposes of the SPA but PW2 is at the same time the defendant's solicitor concerning the scope of redeeming and discharging the said properties. The plaintiff had no power or authority over the charge created by the defendant in favour of CIMB, its financier.

[58] As such, the plaintiff submitted that since the defendant had authorised PW2 to procure the redemption statement (the first) and there was a delay of

A two months on such request being made to RHB Bank on such matter, the delay must therefore be attributed to the defendant.

[59] Whilst it is a pretty standard conveyancing practice for the vendor as owner who charged the property to be responsible for the discharge and redemption, including to procure the redemption statement, the position of the defendant is that the plaintiff's solicitors did not provide the letter requesting the redemption statement, despite the defendant having authorised the plaintiff's solicitors to obtain the redemption statement via a letter dated 23 August 2018.

[60] It is plain from the above stated cl 7.1 of the SPA that the obligation on the defendant to procure or make a request for the redemption statement from RHB Bank arises and starts to run within 14 days *after the defendant's receipt of a letter from the purchaser's solicitors* or financiers requesting for the said redemption statement to begin with.

[61] In my view, the plaintiff's assertion that the defendant appeared to expect that PW2 write to PW2 himself to request for the redemption statement and thereafter forward the same to PW2 after PW2 obtains it is misconceived. This is because by refusing to issue the letter to the defendant requesting the redemption statement and by accepting the defendant's authorisation to obtain the redemption statement, the plaintiff's solicitors had assumed the obligation to obtain the redemption statement.

[62] The plaintiff after all did not dispute that there was a delay by the plaintiff's solicitors, PW2 of Messrs Andrew Jye & Co in obtaining and procuring the said redemption statement, only via the law firm's letter dated 5 November 2018. This was two long months after the execution of the SPA.

[63] As a matter of fact there was this delay in obtaining the redemption statement on the part Andrew Jye & Co. But as the plaintiff did not issue the requisite letter requesting the redemption statement, it was the defendant who then had to authorise the plaintiff's solicitors to obtain the redemption statement vide the letter dated 23 August 2018.

[64] Significantly, it should also be highlighted that the defendant is unrepresented in the SPA. This is clear from Recital cl (7) of the SPA. PW2 of Messrs Andrew Jye & Co himself acknowledged that he only acted for the plaintiff as the purchaser, as follows:

> LKK: So are you aware that for one SPA, a solicitor can only act for one side? It's either purchaser or vendor? So you are aware of this, right?
>
> ANG: Yes, that's why I'm representing the purchaser only.

[65] Additionally, under r 6 of the Bar Council Rulings, the plaintiff's solicitors are prohibited from acting for both the purchaser and vendor as it amounts to a conflict of interest. During cross examination, PW2 confirmed that the plaintiff's solicitors were only authorised by the defendant vis a vis the request to apply for the redemption statement and were not representing the defendant.

[66] Then there is the related issue on the plaintiff's allegation that the defendant had delayed in furnishing its company's documents requested by the plaintiff's solicitors. In his evidence in court PW2 claimed that at the time of signing of the SPA, he had reminded the defendant to provide them the documents such as certified true copy of the directors' and members' resolution, Forms 9, 24, 44, 49, memorandum of association, certified true copy of the identification card of the company's directors (collectively, 'the company documents'). But the company documents were only received by them on 1 October 2019.

[67] Quite apart from the fact this complaint was not pleaded, it must be stated that cl 5.1 of the SPA in fact states that the defendant shall deposit and deliver the company documents to the plaintiff within (14 days *upon receipt by the defendant of a written request from the plaintiff's solicitors.* In other words, the defendant's obligation to provide the Company Documents to the plaintiff only arises after receipt of the written request from the plaintiff's solicitors.

[68] Yet, despite the issue raised by the plaintiff, evidence adduced at trial shows that the plaintiff had in fact only made the first request for the company documents via *whatsapp* on 24 September 2019. And the defendant provided the company documents to the plaintiff on 1 October 2019. As such this other allegation of delay attributed to the defendant too is without merit.

[69] What then is the new deadline for payment of the balance purchase price, given the delay in the request for redemption and more pertinently the fire that partly destroyed the plant on the said properties. Despite the absence of the legal concept of temporary frustration, the conduct of the parties incontrovertibly pointed to an agreement to defer completion, due to the fire.

[70] Thus, from the date of SPA to the request of the first redemption statement was a delay of two months. Then the supervening event of the fire. Restoration works were completed and the completion period resumed on 9 July 2019, and after a further two months (9 September 2019), a fresh or second redemption statement had to be requested. It was from 9 September 2019 that the defendant specified 13 October 2019 to be the completion date by which the balance purchase price had to be made.

[71] In other words, the two months taken by the plaintiff to ask for the first redemption statement resulted in only two months remaining for the plaintiff to complete the SPA (5 November 2018 from 6 September 2018), given the three plus one month completion period. Then the fire outbreak on the said properties on 8 January 2019 (the redemption statement in the meantime, was only obtained in a letter from RHB Bank dated 20 February 2019, and it expired on 12 May 2019). It is undisputed that the fire broke out in the midst of parties procuring the first redemption statement.

[72] Upon completion of reparation and restoration works on the said properties on 9 July 2019 (as per the certificate of work done), the plaintiff's solicitors immediately applied for another, second redemption statement on 10 July 2019. The earlier remainder of two months (after the late request for the first redemption statement) was transposed into the two months upon the request for the second redemption statement, with a new deadline of 9 September 2019.

[73] The second redemption statement was supposed to have been obtained within 14 days, as per cl 7.4 of the SPA, by 24 July 2019 but only received on 27 August 2019, a delay of 34 days. And because of the 34 days, the new deadline was 34 days from the previous expiry of 9 September 2019 — hence 13 October 2019.

[74] At the same time, there is also evidence in the form of WhatsApp messages on 4 September 2019 between the parties (specifically PW2 and DW1) where the plaintiff's solicitors fixed the first date of payment of the balance purchase price two weeks from 4 September 2019, by 18 September 2019. This did not materialise. Then, again based on further WhatsApp message between the same witnesses, this time on 7 October 2019, another payment date was fixed by the plaintiff's solicitors, within five working days from 7 October 2019, by 14 October 2019. Again, the plaintiff did not honour this.

[75] But the plaintiff argued that such deadline on 13 October 2019 was only first made known to the plaintiff by the defendant in the latter's statement of defence and counterclaim. The calculation for that deadline was according to the plaintiff, unilateral and never communicated to the plaintiff.

[76] Evidence however, as shown above, points to the fact that parties have been in communication in relation to the deadline to pay the balance purchase price. I have to repeat that on 4 September 2019, the plaintiff's solicitors fixed the first date for payment, to be made within two weeks from 4 September 2019, by 18 September 2019. No payment was forthcoming. Later on 7 October 2019, the plaintiff's solicitors fixed a second date for payment to be

made within five working days, by 14 October 2019. No payment was made.

[77] These are not merely tentative dates, and it is misconceived for the plaintiff to contend that parties did not set a completion date after the fire accident. I accept the defendant's evidence that the deadline of 13 October 2019 is a contractual deadline calculated based on the SPA and in reference to contemporaneous documents, such as on the date and delay in obtaining the redemption statement and the date the said properties were completely restored, which the plaintiff was fully aware of, and by reference to the validity of the second redemption statement, as stated above.

[78] It must also be said that even if the plaintiff's argument on time no longer being of the essence — which is not the case here — the plaintiff still had failed to pay the balance purchase price anyways. Not even within a reasonable time, let alone with any convenient speed. After all it bears repetition that there was reasonable time of more than four months for the plaintiff to perform its contractual obligation even after the restoration of the said properties (5 July 2019) until the expiration of the second redemption statement which was on 23 November 2019.

[79] The plaintiff argued that despite its letter of undertaking of 24 October 2019 delivered to the defendant on 4 November 2019 with indications that the defendant wanted to proceed with the SPA transaction, in just a span of about two weeks after its receipt of the same, the defendant abruptly issued the notice of termination. The defendant did on 7 October 2019 ask the plaintiff to confirm that the plaintiff was agreeable to fulfil and complete the SPA without any supplementary agreement. In reply, the plaintiff issued a letter dated 24 October 2019 informing that they undertook to complete the SPA.

[80] Even though, it is true as stated by the plaintiff that there is evidence that even beyond 13 October 2019, the defendant appeared to still want to proceed with the transaction, the plaintiff still failed to honour up until the expiry of the second redemption statement, which meant that another request would have to be made to RHB Bank for the third statement, necessitating another set of new timeline for completion.

[81] There is no valid basis to contend that the defendant was approbating and reprobating or that the undertaking letter (which also did not request for any extension of time for the payment of the balance purchase price) constituted some form of a waiver, causing time to remain at large.

[82] It must also be stated that the case of the plaintiff is not greatly assisted by the fact that its two directors — Tan Chong Jean and Lim Chin Keong — the signatories of the SPA were never called as witnesses. Instead, the plaintiff

called PW1 — its business development officer - who repeatedly stated that he did not really know about the SPA and he had left matters for the lawyer to handle.

[83] Evidence thus demonstrates that the plaintiff has clearly failed to ever honour its contractual duty to make payment of the balance purchase price under the SPA based on the various revised deadlines formulated in accordance with the conduct of the parties.

Whether termination by defendant was valid

[84] The case of the defendant on the counterclaim that the termination of the SPA is lawful and the deposit paid by the plaintiff for the SPA may be validly forfeited by the defendant is thus well-supported and should be allowed. The defendant has proved on a balance of probabilities that the plaintiff has failed to pay the balance purchase price within the stipulated deadlines and included its failure to pay the balance purchase price within even the two agreed deadlines fixed by the plaintiff.

[85] As a result of the failure on the part of the plaintiff to fulfil its contractual obligation, cl 15 would kick in, as it did, permitting the defendant to exercise its rights to terminate the SPA and forfeit all the deposit paid under the SPA. This self-explanatory cl 15 of the SPA reads as follows:

> 15. DEFAULT BY THE PURCHASER
>
> In the event that the Vendor has fulfilled his part of the terms and conditions herein contained and the Purchaser shall fail to pay the Balance Purchase Price to the Vendor in accordance with Clause 3 above, the Vendor shall be entitled at any time thereafter to terminate this Agreement by notice in writing to the Purchaser and upon such termination the Deposit paid by the Purchaser shall be forfeited absolutely to the Vendor as agreed liquidated damages and the Vendor shall within fourteen (14) days from the date of receipt of the written termination notice refund to the Purchaser any other monies paid by the Purchaser to the Vendor under this Agreement free of interest failing which the Purchaser shall be entitled to interest at the rate of Eight per centum (8%) per annum on the said monies calculated on a daily basis from the expiry of the fourteenth day until the actual date of payment, such interest is to be paid together with the monies to be paid and/or refunded to the Purchaser and in exchange for such refund, the Purchaser shall then.

[86] The defendant was entitled to terminate the SPA when the plaintiff had failed to make the requisite payment by 13 October 2019. There is no merit to the argument that the termination notice is defective in the absence of sufficient notice for the plaintiff to pay the balance purchase price because the SPA treats time to be of the essence. This is in accord with s 56 of the Contracts Act 1950 which states that when a party to a contract promises to do a certain

thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[87] There is in addition no requirement in cl 15 or anywhere else in the SPA for time be granted to the plaintiff to remedy before the termination becomes effective.

[88] After all, the defendant did follow up with the plaintiff for the payment of the balance purchase price after the restoration of the said properties from the damage caused by fire. The defendant had on 4 September 2019 and 7 October 2019 given notices to the plaintiff on such payment, which resulted in the plaintiff fixing the first (18 September 2019) and second (14 October 2019) dates for payment, which the plaintiff however plainly failed to honour.

[89] The plaintiff, it bears repetition, was further fully aware that the second redemption statement (never mind the delay by the plaintiff's solicitors in requesting for the first) would expire on 23 November 2021 — but still, no payment was forthcoming. The termination by the defendant thus followed the expiry of the second redemption statement.

[90] But whilst the plaintiff confirmed that the said properties were completely restored on 9 July 2019 and even fixed a deadline on 1 February 2020 without asking for the CCC, after the termination of the SPA however, the plaintiff suddenly argued that CCC was required. The plaintiff also claimed that the loan was not approved because there was no CCC. Yet, the plaintiff's financier had issued the amended letter of offer to the defendant without any condition requesting for the CCC. On top of that, as mentioned earlier, the plaintiff only requested the requisite documents from the defendant on 24 September 2019, about one year after the execution of the SPA.

[91] The plaintiff in this regard also cannot blow hot and cold. It cannot approbate and reprobate. In the case of *Bakti Dinamik Sdn Bhd v Bauer (M) Sdn Bhd* [2016] MLJU 1878; [2016] 10 CLJ 247, I stated thus:

> [43] The position taken by the plaintiffs currently may be characterised as one which violated the principle against 'approbating and reprobating'. In the Court of Appeal case of *Visage Continental Sdn Bhd v Smooth Track Sdn Bhd* [2008] 1 MLJ 101; [2007] 6 CLJ 570, Richard Malanjum JCA (as his Lordship then was) referred to various authorities and enunciated clearly the rule that a party should not be allowed to approbate and reprobate as it is a practice that is both plainly unconscionable and unfair.

[92] Since there was no further extension of time and the plaintiff had undoubtedly failed to pay the balance purchase price within the various agreed time periods, the termination of the SPA by the defendant is therefore valid.

CONCLUSION

[93] In my judgment, in view of the foregoing analysis and reasons, the plaintiff has clearly failed to prove its claim against the defendant on a balance of probabilities. The plaintiff's claim is therefore dismissed. On the other hand, the defendant has successfully established its case on the counterclaim against the plaintiff which is therefore allowed. Costs is accordingly awarded to the defendant.

Plaintiff's claim dismissed and defendant's counterclaim allowed.

Reported by Nabilah Syahida Abdullah Salleh